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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1342

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

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IN THE

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OCTOBER TERM, 1971

NO._____

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

To The Honorable Supreme Court Of The United States:

Frederick P. Adams respectfully petitions the Court to grant a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter reverse the cause and remand it for trial on the merits.

Opinions Below

1) The Opinion of the District Court is reported in 316 F. Supp. 938.

2) The Opinion of the Circuit Court is reported in 452 F.2d 994 (12/10/71) (see Appendix "A").

Statement of Jurisdiction

Petitioner seeks to review the Opinion and Judgment of the Court of Appeals, under date of December 10, 1971. Petitioner's Motion for Rehearing was overruled on January 18, 1972 (see Appendix "B"). Statutory jurisdiction is conferred under Title 28 U.S.C.A. §1254.

Questions Presented

1) Whether a United States District Court has admiralty jurisdiction, either under Title 46 U.S.C.A. §740, or under the general maritime law, of a tort occurring on a drawbridge when the draw was being raised *solely to accommodate maritime commerce.*

2) Whether the Court of Appeals utilized an improper procedural test in resolving testimonial differences in favor of Harris County when its jurisdiction existed solely by reason of Title 28 U.S.C.A. §1292(b), the statute authorizing interlocutory review ~~under limited~~ circumstances.

3) Whether the Court of Appeals should have remanded the cause for trial on the merits pursuant to the holding in *Chevron Oil Co. v. Huson,* 92 S.Ct. 349, 356 (12/6/71), since the controversy arose before *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

Constitutional and Statutory Provisions Involved

1) Under the first question presented:

(a) Constitution, Art. III, §2, Cl. 1, providing that the judicial power of the United States "shall extend to *all* cases of admiralty and maritime jurisdiction."

(b) Title 28 U.S.C.A. §1333, reading in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) * * *."

(c) Admiralty Extension Act of 1948, Title 46 U.S.C.A. §740:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, *caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land." (Emphasis added)

2) Under the second question:

Title 28 U.S.C.A. §1292(b):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question as to which there is substantial ground for difference of opinion[1] and that an immediate appeal

1. Incipiently, the District Judge refused to make this determination, believing no "substantial ground for difference of opinion

from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. * * *"

Statement of the Case

On Easter Sunday, March 26, 1967, Petitioner was riding his motorcycle on a roadway which crossed Cedar Bayou, a navigable stream, by means of a drawbridge. As Adams approached the draw section of the bridge, a pleasure boat was likewise approaching in the stream. Suddenly, and without warning, the drawbridge keeper opened the draw and dropped the barricade on Adams, *causing him to become a quadriplegic.*

The Court of Appeals took a view of the evidence that patently favored Respondent. In doing so, it not only quoted portions of the District Court's opinion written before any testimony was taken, but put the case in such a way as to make it appear that there was no connection with maritime commerce. To the contrary, the accident resulted *solely* or *principally* from the operation of the draw to *aid* maritime commerce, and the occurrence was also "caused by a vessel" in the sense those terms are used in the Admiralty Extension Act.

---

existed" (see Appendix "C"), but a spurious and scurrilous effort to mandamus the District Judge, although abortive, resulted in a "suggestion" by the panel (Wisdom, Coleman and Simpson) that the refusal to grant the relief was without prejudice to the County's right to reassert its motion to certify. Thus, in light of the awesome injuries sustained by Adams, his counsel could not in good conscience subject him to the rigors of a trial on the merits, perhaps only to have a successful judgment taken away from him by a panel who appeared to have already "decided" the controversy against him under a wretched attack upon the District Judge and counsel for Petitioner. (See page C4 of Appendix "C")

Reasons for Granting the Writ

1) Is an injury to a person on a drawbridge resulting from the operation of the draw section intended to accommodate maritime commerce a tort under the general maritime law?

The Court of Appeals reasoned that this Court's decision in *Rodrigue v. Aetna Casualty Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), buttressed by its own subsequent decision by the same panel in *Cookmeyer v. Louisiana Department of Highways*, 309 F. Supp. 881 (E.D. La., 1969), aff'd 433 F.2d 386 (5 Cir. 1970), cert. den. 401 U.S. 980 (1970), preempted jurisdiction under the general admiralty law. Respondent also now relies on *Victory Carriers, Inc. v. Bill Law*, 92 S.Ct. 418 (12/13/71), decided subsequent to the opinion in the present case.

Petitioner has continually asserted and insisted that not only are these authorities distinguishable, but that *Rodrigue* is direct authority in his favor. Conceding, *arguendo*, that this Court has essentially reaffirmed the "strict locality" test for determining the presence or absence of admiralty jurisdiction in *Rodrigue* and *Victory Carriers*, nothing was said to enervate the "historical exceptions" extending maritime jurisdiction to causes arising out of the use or employment of navigational aids. *The Raithmoor*, 241 U.S. 166, 36 S.Ct. 514, 60 L.Ed. 937 (1915); *The Blackheath*, 195 U.S. 361, 25 S.Ct. 46, 49 L.Ed. 236 (1904); *Peytavin v. Govt. Employees Ins. Ass'n*, 453 F.2d 1121, 1123 (5 Cir. 1972); *1 Benedict, The Law of Admiralty* (6th Ed.) §129, N.2 (1904). In *Rodrigue* the Court clearly recognized this exception in the following language:

"Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the Sea. To the extent that it has been applied to fixed structures completely sourrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure *solely or principally used as a navigational aid*. But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.

"The accidents in question here involved no collision with a vessel, and the *structure was not a navigational aid*. It was an island, albeit an artificial one, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." (Emphasis added.)

In that the totality of a drawbridge is an obstruction to water commerce, the draw portion, when being operated, is patently an "aid to navigation" within the ambit of this exception. *Clement v. Metropolitan West Side Electric Railway Company*, 123 Fed. 271 (7 Cir. 1903); *United States v. Eastern Transportation Co.*, 50 F. Supp. 815 (Md. 1943). Unquestionably, the sole purpose for operating the draw on the occasion was to permit the passage of a vessel in a navigable stream, albeit a pleasure craft. Nor does the fact that the dropping of the barricade was the immediate cause of the occurrence militate against this conclusion. The purpose of the barricade was as much to prevent an approaching motorist from plunging through the draw and damaging the vessel or its passengers as it was to prevent injury to the motorist. Not even Respondent suggests that maritime jurisdiction would not have

attached had Adams run off the bridge, whether struck by the barricade or not.

Certainly *Victory Carriers* does not emasculate the "historical exception"! The issue there put was:

> "* * * Nor, in the absence of congressional guidance, are we now inclined to depart from prior law and extend the reach of federal law to pier-side accidents *caused by a stevedore's pier-based equipment.*" (Emphasis added.)

Bottomed upon *Nacirema Operating Co. v. Johnson*, 396 U. S. 212, 223, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969), the Court held such an injury, caused by "pier-based equipment," was beyond the pale. (92 S.Ct. at pp. 424-25)

Not only do *Rodrigue*, *Victory Carriers* and *Nacirema Operating Company* turn on statutory attempts to limit or delimit maritime jurisdiction, as the case may be, but in neither instance did this Court suggest that the "navigational aid" exception was to be struck down. Further, had the injury in *Victory Carriers* been precipitated by *"ship-based equipment"* jurisdiction would have existed perforce *Guitierrez v. Watermans Steamship Co.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963). Here, as in the hypothetical example, the injury was precipitated solely by a "navigational aid."

Under the circumstances of this case, it is perhaps not unusual that this panel felt obligated to follow its earlier opinion in the *Cookmeyer* case. What is extraordinary, however, is that panel's unwillingness to mention the distinction between the two fact situations, particularly since it had to have been noted and anticipated by counsel for

Respondent.[2] In that case the injury was not related to the operation or movement of the draw at all, but rather to the motorcyclist striking portions of the bridge when it was in a stationary position.

It would be useless to belabor the questions. The matter is simply one of whether this Court meant what it said in *Rodrigue;* specifically, whether the "structure" causing the injury was used *"solely or principally as a navigational aid."* It clearly was, and this grievously injured young man should not be cast upon the "judicial junk heap" that exists in the state practice.[3]

2) The Court of Appeals erred in considering interlocutory appeal in a context favorable to Respondent.

The Court of Appeals reviewed the record thusly:

On Easter Sunday, March 26, 1967, Mr. Adams, the plaintiff-appellee, was riding his motorcycle on a public highway which crossed Cedar Bayou, a navigable stream, by means of a bridge permanently connected to the roadway and suspended over the water by per-

2. In Respondent's "Supplemental Brief" before the Court of Appeals, at page 11, counsel noted:

"* * * It is anticipated that the plaintiff will insist that the *Cookmeyer* case is not applicable to the situation at hand because *in that case the injuries sustained by the claimant were not directly related to the movement of the bridge as it opened to allow vessels to pass through.* * * *" (Emphasis added.)

3. At the time of this accident, Texas adhered to the ancient and antiquated doctrine of "governmental immunity," which of course has never obtained in admiralty. Since the accident, in large part due to this tragedy, the Texas Legislature enacted a Texas Tort Claims Act which would have provided state-side coverage (but for the overlay of admiralty jurisdiction) for a similar accident. Unfortunately, however, the new Act is prospective only.

manent pilings driven into the channel below. The bridge was equipped with a draw section, which was mechanically raised and lowered to permit the passage of vessels plying the stream. As Adams, on or near the bridge, approached the draw, a relatively small pleasure boat was likewise approaching. To quote the District Court, 316 F.Supp., at 940, "Without any indication from the vessel that it was necessary to do so, the bridge keeper caused the bridge to begin to open. At that instant, when plaintiff began to cross the bridge, the barricade lowered into place and was struck by the motorcycle. Plaintiff was thrown several feet into the air and fell either on the bridge or close by. His theory of recovery is negligent maintenance."

Perhaps the District Court's observations are excusable in that no testimony had been taken at the time the Opinion was written, but the same cannot be said of the Court of Appeals Opinion. Before that Opinion was delivered, Petitioner observed at page 2 of his "Supplemental Brief":

"Statement of the Case

"The Appellant, Harris County, Texas, has incorrectly stated the case. At one point during its Argument (see Page 4 of its Supplementary Brief) it concedes that all facts alleged in the Plaintiff's Original Complaint must be taken as true by the Court. In the very next paragraph, however, it asserts that Adams ran into the "safety barricade arm on the drawbridge" (see Pages 2 and 4). It even purports to summarize deposition testimony to that effect. The precise allegations of the bill of complaint were:

> * * * As a direct and proximate result of the negligence of the employees of Harris County, Texas, and of Harris County, Texas, no adequate warning devices and no adequate warning of the danger confronting Frederick P. Adams by reason of the operation of the drawbridge was given, and by reason of the negligent operation of the drawbridge in question, Frederick P. Adams *was caused to be struck and knocked about by the operation of the drawbridge,* sustaining the injuries herein complained of. (Emphasis added, R. 30)

The only independent eye-witness to the occurrence, Sandra Ann Fortney, who was on board her husband's boat which was approaching the bridge on the occasion, testified in pertinent part:

> "I don't know what caused the bridge to be lifted, but all of a sudden the bridge was being lifted, and I spotted the boy on the motorcycle coming at this slow rate of speed, and all of a sudden the bridge started coming up, and I became alarmed and probably yelled. *All of a sudden the arm dropped and hit him.* * * * (SAF Dep., Page 12)"

In interlocutory appeals, as in summary judgment proceedings, the pleadings of the respondent must be accepted as true and all evidentiary disputes are to be resolved in favor of the party against whom the relief is sought. *United States v. Diebold, Inc.,* 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Vandenberg v. Newsweek, Inc.,* 441 F.2d 378, 379 (5 Cir. 1971); *City of Burbank v. General Electric Co.,* 329 F.2d 825, 829 (9 Cir. 1964); *Dearborn Stove Co. v. Farmers Co-Op,* 304 F.2d 273 (8 Cir. 1962).

As applied to this case, the contravention of those principles resulted in a totally erroneous approach to the dispute. The resolution of the question of whether it was "necessary" or not to raise the draw, and whether Adams ran into the barricade or it "dropped and hit him," have no substance in this type of appeal, although we of course would contend that jurisdiction still exists in either instance.

More specifically, the reference by the Court of Appeals to the contention of Respondent that jurisdiction is preempted because it was not "necessary" to raise the draw undoubtedly led to a misinterpretation of the "caused by a vessel" proviso of the Admiralty Extension Act of 1948. Based upon this erroneous acceptance of testimony *favorable to Respondent*, the Court of Appeals concluded:

> "* * * The District Court stated in its Opinion, 316 F.Supp. at 940, that the bridge keeper cause (sic) the bridge to begin to open, which, in turn, caused the barricade to drop, *without any indication from the vessel that it was necessary to do so.* The inescapable conclusion is that the dropping of the barricade was *solely the act of the bridge keeper* and no act of the vessel was *proximately caused by his negligence*, if there was any." (Page 5 of Appendix "A", emphasis added)

Several observations are indicated.

First, it is apparent that the above summation, as well as the previously quoted resumé of the facts by the Court of Appeal, are in disregard of the pleadings and the only evidence regarding what actually transpired.

Second, the mere fact that some of these observations appear in the original Opinion of the District Court does

not sanctify them as "findings of fact," as that Court was powerless to *find facts* in this present context. Moreover, the statements in the Opinion predated the actual testimony of the only witness to the occurrence who stated Adams "was proceeding at this slow rate of speed" and "all of a sudden the *arm dropped and hit him.*" (Sandra Ann Fortney Dep., p. 12)

Third, even if the bridge keeper did mistakenly assume there was a necessity to raise the draw to permit the passage of the vessel, that "mistake" would not change his actions and conduct to shoreside tort. Even in that event his purpose was to use a "navigational aid" to assist "maritime commerce"; it was not to help Adams, whom he never even saw!

Fourth, and most significantly, the Court of Appeals announced a totally erroneous test for ascertaining jurisdiction under the Admiralty Extension Act when it substituted a "proximate cause" requirement for the "caused by a vessel" language of this salutary legislation. As this Court said in *Victory Carriers*:

> "The relative roles of state and federal law nevertheless remained somewhat confused on the seaward side of the pier. But shoreward, absent legislation, the line held fast. The Court refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks or other shore-based property. The Plymouth, 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1865). Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co., 208 U.S. 316, 28 S.Ct. 414, 52 L.Ed. 508 (1908); The Troy, 208 U.S. 321, 28 S.Ct. 416, 52 L.Ed. 512 (1908); Martin v. West, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed. 159 (1911).

> *"Congress was dissatisfied with these decisions and passed the Admiralty Extension Act of 1948 specifically to overrule or circumvent this line of cases."* (92 S.Ct. at p. 423, emphasis added)

While this quoted language does not relate to the "navigational aid" exception discussed in *Rodrigue,* it clearly sets forth the reason for the Extension Act. Nor has the Act been interpreted to require more than a cause-in-fact relation to the injury or loss. *Gebhard v. Hawaiian Legislator,* 425 F.2d 1303 (9 Cir. 1970); *Fematt v. City of Los Angeles,* 196 F.Supp. 89 (S.D. Cal. 1961); *Havland v. Fearnley & Egger,* 110 F.Supp. 659 (E.D. Pa. 1952). If the Act is to be limited to *proximal conduct,* little purpose was subserved by its enactment.

The Court of Appeals not only myopically considered the record from Petitioner's viewpoint, but it ascribed an unduly restrictive interpretation to the Admiralty Extension Act. If a "vessel" *causes* an occurrence in the sense that it would not have occurred *but for* its presence and movement in navigable waterways, and the instrumentality of harm is solely or principally utilized to aid maritime commerce, it is not or should not be necessary that the harm be a *foreseeable* or *anticipated* consequence of the wrongful act of the defending party for purposes of the attachment of admiralty jurisdiction. These ancillary considerations are only relevant to the merits of the cause!

3) At the least, the cause should be reversed and remanded because it was accepted that an injured claimant did have an admiralty claim prior to Rodrigue in these circumstances.

Prior to *Rodrigue* there was no serious question but that maritime jurisdiction existed in cases such as this.

Counsel for Respondent and the Court of Appeals so recognized. For example, we submit the following observations require a remand under the rule announced in *Chevron Oil Co. v. Huson*, 92 S.Ct. 349, 350 (12/6/71):

(1) The accident in question occurred prior to the decision in *Rodrigue;*

(2) If the present opinion stands, Adams will be without remedy in any form under the law as it has been interpreted;

(3) In Harris County's original Brief, before the Court of Appeals, it was clearly recognized that pre-*Rodrigue* a different conclusion would obtain;

(4) In the letter to the Court of Appeals of December 26, 1971, counsel for the County again recognized the prior status of the law on the question, "Appellee would cause a gathering of eagles to reconsider a question of law that *might have been important two years ago. . .*"; and

(5) At the time the cause was orally argued the presiding judge stated that, but for *Rodrigue*, he would agree with the District Court and counsel for Adams.

In *Huson* the Court said:

> "To hold that the respondent's lawsuit is retroactively time-barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Rodrigue v. Aetna Casualty & Surety Co., supra, 395 U.S. at 361, 365, 89 S.Ct. at 1840, 1842. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on

the basis of superseding legal doctrine that was quite unforseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.

> *"It would also produce the most 'substantial inequitable result,'* Cipriano v. City of Houma, supra, 395 U.S. at 706, 89 S.Ct. at 1900, to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation which the law imposed upon him. In Cipriano v. City of Houma, supra, we invoked the doctrine of nonretroactive application to protect property interests of 'bondholders and others connected with municipal utilities'; and, in Allen v. State Board of Elections, supra, we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury . . . an injury that may significantly undercut his future earning power . . . is entitled to similar protection. As in England v. State Board of Medical Examiners, supra, nonretroactive application here simply preserves his right to a day in court.
>
> "Both a devotion to the underlying purpose of the Land's Act absorption of state law and a weighing of the equities requires non retroactive application of the state statute of limitations here. Accordingly, although holding that the opinion of the Court of Appeals reflects a misapprehension of Rodrigue, we affirm its judgment remanding this case to the trial court. It is so ordered." (Emphasis added)

It would indeed produce a most substantial and inequitable result for the Court to refuse to review this cause. Adams would be without remedy in admiralty, or according to the County, in any forum.

CONCLUSION

No doubt this is the time to face the case for what it is! Petitioner has been grotesquely injured perforce the clear neglect of an employee of a unit of government. The shield of governmental immunity has once again been raised, and while it has now disintegrated in the state system, not so for Fred Adams.

Speaking more legalistically, the case falls within the "historic exception" to the "strict locality of injury test" relating to "navigational aids"; and nothing announced in *Rodrigue* mutates that exception. Furthermore, the injury was "caused by a vessel" within the purview of the Admiralty Extension Act of 1948, and thus the cause should be reversed for a trial on the merits.

Respectfully submitted,

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CERTIFICATE

Three copies of the above and foregoing Petition for Writ of Certiorari have been deposited in the United States mail with first class postage addressed to counsel for Respondent.

W. JAMES KRONZER, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO._____

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

APPENDICES

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2267

FREDERICK P. ADAMS,
Respondent-Appellee,

versus

HARRIS COUNTY, TEXAS,
Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(December 10, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: This was a suit for permanent personal injuries suffered by a motorcyclist on a drawbridge across a navigable stream. The District Court denied a motion to dismiss for lack of admiralty jurisdiction. The opinion below is reported, 316 F.Supp. 938 (S.D., Tex., 1970). Upon interlocutory appeal to this

Court, 28 U.S.C., § 1292(b), the judgment of the District Court is reversed. The cause is remanded with directions to dismiss the complaint for lack of admiralty jurisdiction.

On Easter Sunday, March 26, 1967, Mr. Adams, the plaintiff-appellee, was riding his motorcycle on a public highway which crossed Cedar Bayou, a navigable stream, by means of a bridge permanently connected to the roadway and suspended over the water by permanent pilings driven into the channel below. The bridge was equipped with a draw section, which was mechanically raised and lowered to permit the passage of vessels plying the stream. As Adams, on or near the bridge, approached the draw, a relatively small pleasure boat was likewise approaching. To quote the District Court, 316 F.Supp., at 940, "Without any indication from the vessel that it was necessary to do so, the bridge keeper caused the bridge to begin to open. At that instant, when plaintiff began to cross the bridge, the barricade lowered into place and was struck by the motorcycle. Plaintiff was thrown several feet into the air and fell either on the bridge or close by. His theory of recovery is negligent maintenance".

As to the locality of the injuries, this case is exactly similar to that which we decided in *Cookmeyer v. Louisiana Department of Highways*, 309 F.Supp. 881 (E.D., La., 1969); Affirmed, 5 Cir., 1970, 433 F.2d 386; cert. denied 401 U.S. 980. The only factual difference between *Cookmeyer, supra,* and the instant appeal, as to the locality of the alleged tort, is that in *Cookmeyer* the channel was opened for the passage of vessels by swinging barges on a pivot, whereas here the bridge was opened for the passage of vessels by raising and lowering the draw section.

In *Cookmeyer*, the District Court held, 309 F.Supp., at 884:

> "The accident forming the basis of this suit having taken place on a bridge, this Court lacks admiralty jurisdiction under the premise that a bridge or other structure firmly attached to the land is an extension of land and hence not a subject of the maritime jurisdiction of this Court."

We affirmed and the Supreme Court denied certiorari.

Therefore, so far as it reaches, *Cookmeyer* is controlling and there was no admiralty jurisdiction.

Plaintiff-appellant contends, however, that because the light pleasure craft was approaching the bridge and the draw was in the act of being raised to permit it to pass through the bridge, jurisdiction attaches by reason of the Admiralty Extension Act of 1948, 46 U.S.C., §740:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

In *Rodrigue v. Aetna Casualty Company*, 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360, the Supreme Court spoke as follows:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea. To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved

collision with a ship and has been explained by the use of the structure solely or principally as a navigational aid. But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.

"The accidents in question here involved no collision with a vessel, and the structures were not navigational aids."

Again, in *Nacirema Operating Company, Inc. v. Johnson*, 1969, 396 U.S. 212, 222, 90 S.Ct. 347, 24 L.Ed.2d 371, the Supreme Court elaborated upon the Extension Act:

"The Act no doubt extended the admiralty tort jurisdiction to ship-caused injuries on a pier. But far from modifying the clear understanding in the law that a pier was an extension of land and that a pier injury was not on navigable waters but on land, the Act accepts that rule and nevertheless declares such injuries to be maritime torts if caused by a vessel on navigable waters.

"The Extension Act was passed to remedy the completely different problem that arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all."

In this case we have navigable water and we have a vessel, albeit a light pleasure boat. The question, then, is: Did the vessel cause the injuries to the motorcyclist on the bridge? The vessel was simply approaching the bridge, as any vessel in those waters had a right to do. There is no showing that it was negligent in any respect. It is not charged with a tort of any

kind. It had no control, could exercise none, and attempted to exercise none over the manner in which the bridge keeper performed his duties. As mentioned in *Rodrigue* and in *Nacirema, supra,* there was no physical contact between the pleasure boat and the bridge. There was no damage to the bridge. There was no physical contact between the boat and the motorcycle. The District Court stated in its opinion, 316 F.Supp. at 940, that the bridge keeper caused the bridge to begin to open, which, in turn, caused the barricade to drop, without any indication from the vessel that it was necessary to do so. The inescapable conclusion is that the dropping of the barricade was solely the act of the bridge keeper and no act of the vessel proximately caused his negligence, if there was any.

It inexorably follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act.

At 316 F.Supp. 943, the District Court wrote as follows:

> "There is also an alternate theory upon which admiralty jurisdiction can be based. That theory is, notwithstanding the locality of the events which gave rise to this suit, the tort is one essentially maritime in nature. Consequently, torts occurring as a consequence of the operation of drawbridges are related to that purpose and are cognizable in a court of admiralty.
>
> "It has not been overlooked that the function of a bridge, as such, over navigable water is to allow vehicular and pedestrian traffic to pass from one side of the waterway to the other. The sole and exclusive function of a drawbridge, however, is to allow mari-

time traffic to pass along navigable water. Because a vessel was passing underneath the drawbridge in this case, and because plaintiff was injured by the movement of that bridge to allow passage, the relationship of those injuries is so substantially related to maritime commerce as to be embraced by admiralty jurisdiction."

This view is supported by no citation to precedent. It fails to take into consideration that the injuries in question occurred on a permanently fixed extension of land and in the absence of any maritime causation other than the approach of a vessel, without more.

The judgment of the District Court denying the motion to dismiss for lack of jurisdiction, is reversed. The case is remanded, with directions to dismiss the complaint.

REVERSED and REMANDED, with directions.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2267

FREDERICK P. ADAMS,
Respondent-Appellee,

versus

HARRIS COUNTY, TEXAS,
Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Dec. 10, 1971, 5 Cir, 1971, ___ F.2d ___).

(January 18, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "C"

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 69-H-215

FREDERIC P. ADAMS

V.

HARRIS COUNTY, TEXAS

(Filed March 20, 1971)

ORDER GRANTING DEFENDANT'S MOTION FOR INTERLOCUTORY APPEAL IN ACCORDANCE WITH THE PROVISIONS OF 28 U.S.C. §1292(b)

This suit was filed on March 6, 1969, in which the plaintiff alleges he sustained permanent injuries as a result of an accident that occurred on March 26, 1967, on which occasion he sustained his injuries as a result of the operation of a drawbridge across Cedar Bayou in Harris County, Texas, Cedar Bayou being a navigable body of water on and over which vessels carrying cargo in interstate and international commerce navigate. The injuries received by plaintiff resulted in his becoming paralyzed from his neck down and causing him to be a quadriplegic. This brief resume of facts is undisputed.

The defendant, Harris County, initially filed a motion to dismiss on the basis that this court lacked admiralty jurisdiction.

On September 5, 1969, a pretrial conference was held at which time the plaintiff filed its brief in opposition to defendant's motion to dismiss and defendant was given to November 3, 1969, to file a reply brief. On October 30, 1969, the court granted defendant an extension of time to file its brief. On November 14, 1969, the defendant's brief was filed. On July 30, 1970, this court entered its order overruling defendant's motion to dismiss, giving its reasons therefor in a memorandum opinion reported at 316 F. Supp. 938.

Defendant's grounds for its motion to dismiss were three in number:

(1) that the tort was not a maritime tort;

(2) that the sovereign immunity of the State of Texas precludes the suit; and

(3) that the eleventh amendment to the Constitution of the United States is applicable, thereby preventing a suit of a resident of the State of Texas against the State of Texas.

On August 10, 1970, the defendant filed its motion requesting this court to amend its order overruling defendant's motion to dismiss and requesting the court to permit an interlocutory appeal in accordance with 28 U.S.C. § 1292(b).

On October 15, 1970, a pretrial conference was set for February 4, 1971, and on that date a pretrial conference was held at which this court discussed defendant's

motion to certify an interlocutory appeal and same was denied and the attorneys were ordered to complete all discovery in the case and have this court's pretrial order filed on or before June 1, 1971, and the case was set for a trial docket call on June 1, 1971, at 9:30 a.m.

On March 17, 1971, the defendant filed a petition for writ of mandamus with the United States Court of Appeals for the Fifth Circuit in which defendant requested that court to mandamus this court requiring this court to certify an interlocutory appeal.

On April 8, 1971, the Court of Appeals denied defendant's petition for writ of mandamus without prejudice to the rights of the parties to pursue steps leading to appeal under 28 U.S.C. § 1292(b), including motion for rehearing which motion has now been filed by defendant.

This court set a pretrial conference for May 14, 1971, to discuss defendant's new motion. As a result of that conference and for the reasons hereinafter stated, this court grants defendant's new motion for an interlocutory appeal under 28 U.S.C. § 1292(b).

Title 28 U.S.C. §1292(b) provides in pertinent part that the Courts of Appeal shall have jurisdiction of an appeal "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

Although this case is set for trial on June 1, 1971, and could go to trial on that date and involves a rather uncomplicated factual situation, *the attorneys for the plaintiff have now stated to the court that the physical and mental condition of the plaintiff is such that they are unwilling to subject him to a trial if there is any substantial question of federal jurisdiction which could possibly cause the trial to be a useless endeavor,* (emphasis supplied by counsel for Petitioner) and this has caused them to have no objection to the certification of an interlocutory appeal. This position and lack of opposition has persuaded this court that the administration of justice would be best served if the court certifies for an interlocutory appeal its order overruling defendant's motion to dismiss for want of jurisdiction.

The controlling questions of law in this case are whether or not plaintiff's injury resulted from a maritime tort and thereby federal jurisdiction attaches under traditional admiralty principles and the question of whether or not the Admiralty Extension Act applies. Each of these questions was discussed in this courts Memorandum Opinion, 316 F. Supp. at 941-943. This court recognizes that there could be substantial grounds for differences of opinion in connection with these questions, although this court is confident of the correctness of its disposition of these questions. In connection with this court's conclusion that federal jurisdiction attaches under traditional admiralty principles, this court stated in its Memorandum Opinion as follows:

> "There is also an alternate theory upon which admiralty jurisdiction can be based. That theory is, notwithstanding the locality of the events which gave

> rise to this suit, the tort is one essentially maritime in nature. * * * The sole and exclusive function of a drawbridge, however, is to allow maritime traffic to pass along navigable water. Because a vessel was passing underneath the drawbridge in this case, and because plaintiff was injured by the movement of that bridge to allow passage, the relationship of those injuries is so substantially related to maritime commerce as to be embraced by admiralty jurisdiction."

To amplify this conclusion, this court wishes to emphasize its considered judgment that the "draw" portion of a drawbridge has one and only one function and that is as an aid to navigation. It can have no other function. The bridge itself may have a function of connecting two bodies of land separated by navigable waters or streams and thereby permit vehicular traffic to cross over such navigable waters or streams; but the "draw" portion of the bridge, when it is used for the purpose of opening the bridge so as to permit vessels to pass underneath, can have no function of aiding vehicular traffic but can have only the one function of aiding navigation. The Supreme Court in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 23 L.Ed.2d 360 (1969), apparently recognized that admiralty jurisdiction would attach if the instrumentality causing the injury was a navigational aid. In that opinion, Mr. Justice White speaking for a unanimous court, pointed out that the plaintiffs there met their deaths on artificial island drilling rigs located off the Louisiana coast and that *these islands were not erected primarily as navigational aids* and the accident bore no relation to any "such function" and "the accidents in question . . . involved no collision with a vessel, *and the structures were not navigational aids.*" *Rodrigue*, 395 U.S. at 360. Apparently

the result of *Rodrigue* would have been otherwise had the instrumentality causing the injury been a navigational aid as was the instrumentality here.

For the reasons stated herein and no others, this court grants defendant's motion to certify for an interlocutory appeal and the same is so ordered. This order is to be effective as of June 1, 1971.

/s/ JOHN V. SINGLETON
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 71-1342

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Harris County, Texas will continue to abide by the appropriate ruling of the Honorable Fifth Circuit Court of Appeal, wherein it was ordered that "There is no place in this appeal for acrimony or comments bearing on personalities." (Order Granting Permission To Appeal, July 8, 1971, Page 2). For the convenience of The Honorable Supreme Court, Harris County, Texas, will, insofar as possible, follow the format adopted by the Claimant in his Petition For Writ Of Certiorari.	
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 71-1342

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court Of The United States:

Harris County, Texas respectfully requests The Honorable Supreme Court to decline Frederick P. Adams' request for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Does the District Court for the Southern District of Texas have jurisdiction in this cause, either by application of the traditional principles of admiralty law or by virtue of an application of the Admiralty Extension Act?

STATEMENT OF THE CASE

This cause was filed in Admiralty by Frederick P. Adams against Harris County, Texas. *Mr. Adams has also filed a suit in the District Court of Harris County, Texas, which is pending.* Adams seeks to recover damages for bodily injuries sustained when a motorcycle, which he was operating, collided with a safety barricade arm on a drawbridge over Cedar Bayou in Chambers County. The bridge is also located within the boundaries of the City of Baytown, Texas, and the western half of the bridge is in Harris County. The safety barricade arm is of the type often seen at railroad crossings, and was raised and lowered across the roadway. A Harris County employee was manning the mechanisms at the time of Mr. Adams' collision with the safety barricade arm. The safety barricade arm is not attached to the draw portion of the bridge, nor has it ever been alleged that such is the case. It is alleged by the Plaintiff that at the time of Mr. Adams' collision with the safety barricade arm, the drawbridge mechanism was being raised, and that the safety barricade arm had been lowered to permit the passage of a pleasure boat through the obstructing bridge area. The Petitioner has conceded that he was injured by the barricade arm as he *approached* the draw area of the bridge. (See Respondent-Appellee's Supplemental Brief, Page 3, presented to the Fifth Circuit and also Claimant's Petition for Writ of Certiorari, Page 4).

STATEMENT OF POLICY

Harris County, Texas will continue to abide by the appropriate ruling of the Honorable Fifth Circuit Court of Appeals, wherein it was ordered that "There is no place in this appeal for acrimony or comments bearing on personalities." (Order Granting Permission To Appeal, July 8, 1971, Page 2). For the convenience of The Honorable Supreme Court, Harris County, Texas will, insofar as possible, follow the format adopted by the Claimant in his Petition For Writ Of Certiorari.

REASONS FOR DENYING THE WRIT

We note at the outset that the Petitioner has finally and properly foregone his "maritime connection test" argument that was stressed, and relied on so heavily by said party and The Honorable Trial Court in briefs and oral arguments. The Petitioner continues to rely on his other contrived arguments, and he has devised additional ones as well. Claimant now advances and continues to promote the following arguments:

(1) The plaintiff was injured by the movement of the draw portion of the bridge, and the draw portion of the bridge must be classified as an aid to navigation. Under traditional rules of admiralty, not considering the Admiralty Extension Act, aids to navigation have not been encompassed within the land extension doctrine. Therefore, under the locality test as laid down in The Plymouth, 3 Wall. 20, 70 U.S. 20 (1866), the tort alleged is cognizable in admiralty.

(2) Even if the draw portion of the bridge is not an aid to navigation, the case involves a maritime tort because under the terms of the Admiralty Extension Act (62 Stat. 496, 46 U.S. Code, sec. 740,

1948 A.M.C. 1060) the injuries were "caused by a vessel" since the bridge was allegedly opening for a vessel at the time of collision.

(3) The Honorable Fifth Circuit Court of Appeals allegedly utilized a procedural test improperly. .

(4) The Claimant should be given favored treatment such as was allowed the plaintiff in Chevron Oil Co. v. Huson, 92 S.Ct. 349 (1971).

It has been fervently argued by the plaintiff in this cause that the movable portion of the bridge over Cedar Bayou must be classified by the law as an "aid to navigation." The argument goes that if this technical classification is correct, then admiralty jurisdiction attaches in the cause under traditional principles of maritime law. Such a stance is untenable. The Plaintiff's Original Complaint alleges that ". . . Frederick P. Adams was caused to be struck and knocked about by the operation of the drawbridge . . ." Claimant, since filing his original complaint in the Trial Court, has, in effect, stipulated that he was struck by the guard arm and not the drawbridge. In Petitioner's Statement of the Case, contained in his Petition for Writ of Certiorari, he says "As Adams *approached* the draw section of the bridge . . . The drawbridge keeper opened the draw and *dropped the barricade* on Adams . . .". (Page 4). This same stipulation was made before the Fifth Circuit in Claimant's Respondent-Appellee's Supplement Brief. (Page 3). This stipulation is mentioned only in passing, and it is Harris County's position that it does not matter in the least, for the purposes of these proceedings, whether Mr. Adams struck the bridge or the guard arm, or whether they struck him.

A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and con-

venience to commerce upon land. *Clement v. Metropolitan West Side El. Ry. Co.*, 123 Fed. Reporter 271 (U.S. Circuit Ct. of App., 7th Cir. 1903). A bridge can be made less of an obstruction to navigation by making a portion of it movable to permit vessels to pass through, but a bridge so constructed can never be classified as an "aid to navigation" merely because this concession is made to water commerce. For purposes of analogy, it should be noted that the United States Supreme Court has held that artificial island drilling rigs are not aids to navigation. *Rodrique, et al v. Aetna Casualty and Surety Co. et al*, (U.S. Sup. Ct. 1969). Offshore rigs, like bridges, are obstructions to navigation. Federal regulations require that beacon lights be placed on the rigs to warn of such obstruction at night. There is no doubt that these beacon lights cause the rigs to be less obstructive to navigation than they would otherwise be, and in fact often cause the platforms to become lighted markers for nighttime navigation. However, the placing of the beacons cannot change a rig's basic status as an obstruction to navigation to that of a "navigational aid." The term "navigation aids" has traditionally been used to refer to buoys of all types and lighthouses which are placed and constructed for the *sole purpose* of aiding navigation in the water.

The United States Supreme Court has ruled that a drawbridge, and specifically the *movable or draw portion* of a drawbridge, are extensions of the land and not AIDS TO NAVIGATION in the maritime sense. In the sister decisions of *Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co.*, 208 U.S. 316, 28 S.Ct. 416 (1908) and *Duluth & Superior Bridge Co. v. Steamer "Troy"*, 208 U.S. 321, 28 S.Ct. 418 (1908), which should be read together, the U. S. Supreme Court said, as follows:

"On the hearing the district court sustained the exception and dismissed the libel 'on the ground that, although the property injured by said disaster, said dock, said center pier, and said protection piling work, stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation, for which reason there is no authority for sustaining the jurisdiction of a court of admiralty over the wrong complained of and the cause of action set forth in the libel.' It is unnecessary to cite the numerous cases to the same effect to be found in the books. The rule stated has been accepted generally by bench and bar, and has never been overruled, *though counsel express the hope that it may be because of our decision in the Blackheath* (United States v. Evans) 195 U.S. 361, 49 L.ed. 236, 25 Sup. Ct. Rep. 46. In that case Mr. Justice Brown, in concurring announced the view that the effect of the decision was to overrule what had previously been laid down in the cases we have cited. But the Court held that the opinion was not opposed to the prior adjudications, and, without entering into the elements of distinction between that case and The Plymouth, said: 'It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty,—a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea'.

"The case was a libel in rem against a British vessel for the destruction of a beacon, number 7, Mobile ship channel lights, caused by the alleged negligent running into the beacon by the vessel. The

beacon stood 15 or 20 feet from the channel of Mobile river, or bay, in water 12 or 15 feet deep, and was built on piles driven firmly into the bottom. The damage was to property located in navigable waters, solely an aid to navigation, and maritime in nature, and having no other purpose or function.

"In the present case damage to shore dock, and to bridge, protection piling, and pier, by a vessel being forced against each of them by the vessel proceeded against, as well as damage to shore dock, abutment, protection piling, pier and dock foundation by a wash said to be due to the increased current arising from partial damming of the stream by the three vessels, brought into such position by the alleged fault of the vessel proceeded against, was sought to be recovered. But the bridges, shore docks, protection piling, piers, etc. pertained to the land. *They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such.*

"The proposition contended for is that the jurisdiction of the admiralty court should be extended to 'any claim for damages by any ship,' according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years, because of some supposed convenience.

"Unless we do that, this decree must be affirmed, and it is so ordered."

"TROY"

"Appeal from the District Court of the United States for the Western District of Wisconsin to review a decree dismissing, for want of jurisdiction, a libel in rem against a vessel *for injuries inflicted*

to the draw of a bridge over a navigable stream and to its center pier protection. Affirmed.

"The facts are stated in the opinion.

"The Duluth & Superior Bridge Company owned and operated a bridge between the cities of Duluth, Minnesota, and Superior, Wisconsin, over the St. Louis river,—a navigable stream. *The bridge was equipped with a swinging span, supported to a turntable resting on a base of stone and piles driven into the bottom of the river, leaving a space for the passage of vessels on either side of the supporting structure.* When closed its ends rested upon permanent abutments, forming a passageway over the stream for street cars and foot passengers, *and when opened allowing the passage of the largest lake steamers.*

"On August 11, 1906, *the merchant steamer Troy, inbound, struck the center pier protection and glanced into the draw of the bridge, inflicting heavy damage.* The bridge company filed a libel against the Troy in the district court for the western district of Wisconsin, in admiralty, claiming large damages. The Western Transit Company, owner of the Troy, filed exceptions to the libel, as follows:

'1st. That it appears from the averments of the libel that the bridge alleged to have been injured was a structure on land, for purposes of land travel and convenience exclusively, *not erected, maintained, or operated in any sense or in any degree in aid of navigation, but, on the contrary, an obstruction and impediment to the navigation of a public navigable water channel and highway,* a part of the public waters of the United States, then and there navigable to ships engaged in commerce and navigation.

'2nd. That whatever of damage came to the bridge occurred on land, and no part of the same occurred or was suffered on water in place or man-

ner within the jurisdiction of an admiralty court of the United States.

'3rd. That the claim of damage propounded in the libel fails to show a case within the admiralty jurisdiction of this honorable court, according to the grant of such jurisdiction in the Constitution of the United States and the course and practice in admiralty courts of the United States.'

"The court sustained the exceptions and dismissed the libel with costs, whereupon the case was brought by appeal to this court, the question of jurisdiction being certified.

"*The Cleveland Terminal & Valley R. Co. v. Cleveland S.S. Co.* [just cited] 208 U.S. 316, 52 L.ed.____, 28 Sup. Ct. Rep. 414, involved substantially the same questions of jurisdiction that are involved in this case. There the steamer Reis collided with the center protection of a bridge located in the navigable channel of the Cuyahoga river and injured it, and, at the same time, the abutment or shore end of the bridge, and the wharf or dock in the vicinity. In that case the bridge itself was not injured, *while in this case the center protection and bridge were both injured.* The views we have expressed in that case must govern the disposition of this case, and the decree is affirmed." (Emphasis added)

In *The Steel Ranger,* 62 Fed. Sup. 605 (S.D. New York, 1945) the Court discussed the criteria for determining whether or not a specific structure is an "aid to navigation in the maritime sense." The Court said as follows:

"The question here presented is this: Was the injured thing—the magnetic cable, its coil and appurtenances—an instrument of navigation or an aid to navigation and maritime in nature having no

other purpose or function? On the answer to that question depends the answer to the basic question raised by respondent's motion: Does the libel state a maritime tort over which the District Court has jurisdiction as a court of admiralty? *Cleveland Terminal R.R. v. Steamship Co.*, 208 U.S. 316, at page 320, 28 S.Ct. 414, 52 L.Ed. 508, 13 Ann. Cas. 1215.

"The fact that the tubes were imbedded in the channel bottom or that the control station was built on pilings, so that there was thus an 'attachment to the soil' of the river bottom, would not be 'a peremptory bar' to admiralty jurisdiction if *'the injured thing was an instrument of navigation, and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea.'* The Blackheath, 195 U.S. 361, at page 365, 25 S.Ct. 46, at page 47, 49 L.Ed. 236, opinion by Mr. Justice Holmes.

"[2] In commenting on the Blackheath case Chief Justice Fuller in *Cleveland Terminal R.R. v. Steamship Co.*, supra, [208 U.S. 316, 28 S.Ct. 416] stated that in the Blackheath case 'The damage was to property located in navigable waters, *solely an aid to navigation, and maritime in nature, and having no other purpose or function.*' In the Cleveland R.R. Case *the damage was caused by vessels adrift coming into contact with a shore dock, a bridge with a swinging span, an abutment piling and a pier.* The court stated that *'None of these structures were aides to navigation in the maritime sense, but extensions of the shore and aides to commerce on land as such.'* In the Raithmore, 241 U.S. 166, 36 S.Ct. 514, 516, 60 L.Ed. 937, Chief Justice Hughes applied the doctrine of the Blackheath case to a claim for damages caused by a vessel colliding with an unfinished beacon, in the course of construction in navigable waters, which was 'simply to serve as an aid to navigation' but not yet in use as such. In the present case the

fact that the magnetic field installation had not been entirely connected and in operation at the time of the accident would not be a bar, if admiralty jurisdiction otherwise existed.

"The question presented on the motion before me involve those two possible uses and also a third, the alleged availability of the magnetic channel range as an aid to vessels navigating the channel in a fog. But the latter is only an incidental use. The primary purpose for which the apparatus had been designed and installed was to test a ship's degaussing apparatus. That I hold should not be classified as 'an aid to navigation in the maritime sense,' under the ruling of the United States Supreme Court." (Emphasis added)

Much more recently, of course, the Fifth Circuit Court of Appeals in *Cookmeyer v. La. Dept. of Hwys.*, 309 F. Supp. 881, 1970 A.M.C. 584, held that:

"Benedict's treatise considers purpose to be determinative of the nature of a structure . . .

"The primary purpose of the pontoon bridge was to serve as a span connecting North and South shores of the Mississippi River Gulf Outlet, over which vehicular traffic might pass, pending completion of a high level bridge at an adjacent site. It was not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. *When the pontoons were turned on their pivots to allow water traffic to pass, they were performing a function ancillary to the primary purpose of bridging the distance between the two shores.* At such times, it should be noted, the pontoons remained attached to the permanent pivot piling structure, and carried not passengers or cargo in navigation. *In the light of the function or mission of this special structure,*

> *the assembly was a bridge and not a barge.* It functioned as a bridge, and was moved through the water only when that function yielded of necessity to the requirements of the Gulf Outlet's water traffic." (Emphasis added)

The U. S. Supreme Court properly refused twice to hear an appeal of *Cookmeyer.*

Plaintiff's Original Complaint says that "Frederick P. Adams' injury *was clearly and directly related to maritime commerce or navigation* for the reason that maritime commerce and navigation was the reason that the bridge was being operated, causing the severe injuries to Frederick P. Adams." (Emphasis added). The Extension of Admiralty Jurisdiction Act (62 Stat. 496, 46 U.S. Code. Sec. 740, 1948 A.M.C. 1060) relied upon so heavily to date by the appellee, reads in pertinent part, as follows:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land." (Emphasis added)

The act does not extend admiralty jurisdiction to situations where the acts complained of were committed on land and the injuries were sustained on land. In *Nacirema Operating Co. v. Johnson, et al,* (90 Sup. Ct. 347, 396 U.S. 212, 1969), the United States Supreme Court, when speaking of the Extension of Admiralty Act, said:

> "By its very choice of language, the Act reinforces the conclusion that Congress was well aware of the distinction between land injuries and water injuries and that when it limited recovery to injuries on

navigable waters, it did not mean injuries on land. The Act no doubt extended the admiralty tort jurisdiction to *ship-caused* injuries on a pier . . .

"The [Admiralty] Extension Act was passed to remedy the completely different problem which arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all." (Emphasis added)

Harris County thinks it worthy of note that Frederick Adams' Original Complaint, which has never been amended, does not even track the language of the Admiralty Extension Act. That is, the Plaintiff never alleged in his Original Complaint that the injuries complained of were "caused by a vessel on navigable waters." The best the Plaintiff could do was to allege a virtually nonexistent "maritime connection" as quoted above. The Extension Act has had the effect of permitting some claimants to maintain an otherwise unavailable action in admiralty as set forth in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 1963 A.M.C. 1649 (1962), but in such cases the injuries complained of were clearly *proximately caused* by a vessel or a vessel's crew. In *Gutierrez*, the result of the shipowner's tort was felt ashore and admiralty jurisdiction clearly attached.

A recent case involving an injury sustained upon an "aid to navigation" is *Clifford Gowdy v. United States of America*, (412 Fed. 2d 525, 1969 A.M.C. 1676, 6th Circ., Cert. den.). In that case the claimant electrician sued the United States after falling from the roof of a lighthouse while performing tasks under a contract with the Coast Guard. The lighthouse, an aid to navigation, was located upon a jetty or breakwater. The District Court held that there was jurisdiction in admiralty since

lighthouses are not encompassed within the land extension doctrine and the breakwater involved was readily distinguishable from a wharf or a pier. The Circuit Court, quoting from *Chapman v. City of Grosse Pointe Farms,* (1968 A.M.C. 386, 385 F.2d 862, 6 Cir. 1967), reversed the District Court saying that no maritime status or connection was involved and restated the rule as follows:

> *"While the locality test alone should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water,* it is here determined that jurisdiction may not be based solely on the locality criterion." (Emphasis added)

The Court went on to say that the application of maritime law in the cause would not further the goal of uniformity in the area of maritime commerce, thus stating one more cogent rule or test to be used in such borderline cases in determining the question of jurisdiction.

In *Bible v. Chevron Oil Co., et al,* (308 F. Supp. 312; 1970 A.M.C. 875; E.D. La. 1969), the Court homed in on the locality issue in determining admiralty jurisdiction. In that case the claimant was working on an off-shore oil rig and fell from the platform into the water. The injuries were received before the plaintiff struck the water. Judge Rubin stated well the rule that the locality test is applied by determining where the last event to make the actor liable took place, i.e., where the harmful force takes effect upon the claimant's body. The Judge went on to rule that the place of final aggravation is not controlling. So the rule is restated that if the injuries complained of were not caused by a vessel in navigable waters, then the locality

rule is controlling in a case such as the one at hand. See also *La Lande v. Gulf Oil Corp.*, (317 F. Supp. 692, 696; W.D. La. 1970).

This cause is not of the troublesome variety involving an injured seaman, vicarious seaman or longshoreman. The Fifth Circuit's opinion in Harris County's favor cannot have the effect of watering down these workers' long fought for rights to be provided with a seaworthy vessel or a safe place in which to work. We feel compelled to speak of this phase of admiralty law only because appellee has tended to rely on a line of cases involving seaman's rights to advance his position in the situation at hand.

There is no doubt that special laws such as the Jones Act, 46 U.S.C.A. Section 688, have extended admiralty jurisdiction. In *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 488 (1943) and *Swanson v. Marra Bros., Inc.*, 66 S.Ct. 869; the U. S. Supreme Court laid any arguments to the contrary to rest. The same Court, however, has made it abundantly clear, that these special acts cannot apply unless the requisite *maritime status or connection* between the parties exist. "The jurisdiction of admiralty over a cause of action under The Jones Act by a seaman injured on shore while engaged in his duties as a seaman, depends, *not on the place where the injury is inflicted,* but on the nature of the seaman's service, *his status as a member of the vessel, and his relationship as such to the vessel and its operation on navigable waters.*" (Emphasis added). *Swanson v. Marra Bros.*, (supra). No one disputes that these special acts have extended admiralty jurisdiction in the limited sphere of injuries-on-the-job in a maritime setting, but these statutes, and all cases connected therewith, are irrelevant to the plaintiff's case. *Nacirema* held that the Admiralty Exten-

sion Act did not extend the coverage of the Longshoreman's Act. See *Evans v. La. Dept. of Hwys.*, 430 Fed. (2d series) 1280 U.S. Ct. of Appeals, Fifth Cir. Aug. 1970, as a case involving an injury on a drawbridge by a state employee asserting status as a vicarious seaman.

Three recent cases act in unison to demolish the Plaintiff's stance in this matter. In the *Rodrique* case (supra), Mr. Justice White said, while speaking for a unanimous Court, as follows:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, *bridges*, or even ramps or railways running into the Sea. To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure *solely or principally* as a navigational aid. But when the damage is *caused by a vessel* admitted in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.
>
> *"The accidents in question here involved no collision with a vessel, and the structure was not a navigational aid.* It was an island, albeit an artificial one, and the accidents *had no connection with the ordinary stuff of admiralty than do accidents on piers."* (Emphasis added)

This wording, coupled with the reasoning in the *Gutierrez* case (supra) forecloses the plaintiff's argument that relief for a land-based tort may be sought in admiralty *where, as here, there exists only the most gossamer, tenuous and evanescent causal connection between a vessel or its crew and the land-based tort.*

It is defendant's view that the causal relationship between a vessel and/or its crew and the land based tort must be clear and overpowering before admiralty jurisdiction will attach. The U. S. Supreme Court, as above quoted, has indicated that there must be an impact, or at least a transfer of energy emanating from a vessel's motive force (such as a vessel's wake) before admiralty jurisdiction will exist *in a case such as the one at hand.* It is Harris County's view, though no Court to date has stated the law in exactly this manner, that this Honorable Court should apply the following rule:

> When there is no maritime status or connection between the parties to the suit as contemplated by special remedial laws such as the Jones Act and the Harbor Workers and Longshoremens Act, and if the injuries complained of were not *directly caused* by the misconduct and/or the impact of a vessel on navigable waters or the misconduct of the crew of such a vessel, then the locality-of-the-injury test is controlling upon the question of jurisdiction in admiralty.

The Honrable Fifth Circuit Court of Appeals isolated the issue exceptionally well in its opinion involving the situation at hand, when it reasoned as follows:

> "In this case we have navigable water and we have a vessel, albeit a light pleasure boat. The question, then, is: Did the vessel cause the injuries to the motorcyclist on the bridge? The vessel was simply approaching the bridge, as any vessel in those waters had a right to do. There is no showing that it was negligent in any respect. *It is not charged with a tort of any kind. It had no control; could exercise none, and attempted to exercise none over the manner in*

which the bridge keeper performed his duties. As mentioned in Rodrique and in Nacirema, supra, there was no physical contact between the pleasure boat and the bridge. There was no damage to the bridge. There was no physical contact between the boat and the motorcycle. The District Court stated in its opinion, 316 F. Supp. at 940, that the bridge keeper caused the bridge to begin to open, which, in turn, caused the barricade to drop, without any indication from the vessel that it was necessary to do so. The inescapable conclusion is that the dropping of the barricade was solely the act of the bridge keeper and no act of the vessel proximately caused his negligence, if there was any.

"It inexorably follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act." (Emphasis added)

This quotation is the heart of the Court's opinion. Observe that the Court has presumed that all of Frederick Adams' allegations are true, but the inexorable conclusion follows that the injuries were not "caused by a vessel on navigable waters." As stated previously, the Plaintiff did not even allege in his Complaint that the vessel caused the injuries complained of. He only alleged an evanescent maritime connection.

The Claimant finds fault with the Fifth Circuit's discussion of various conclusions drawn by the Honorable Trial Judge in this case. It is clear that the Fifth Circuit did not base its conclusions upon unwarranted assumptions made by that Court. The Honorable Trial Judge chose to align himself completely with the Claimant's cause, almost to the point of becoming an advocate for Claimant. It is only reasonable, therefore, that the Fifth Circuit

discussed the Court's conclusions, though such was not essential to the Circuit Court's decision. Furthermore, please remember that the Trial Court is the trier of facts in maritime cases, and his conclusions would bear far more weight under these circumstances than a case that would eventually be tried before a jury. For these reasons, no procedural error was committed by the Honorable Fifth Circuit Court of Appeals.

The second and third knells were sounded for Plaintiff's stand in this matter by the Fifth Circuit Court of Appeals in *Cookmeyer* (sup. a) and This Honorable Supreme Court in *Victory Carriers, Inc., et al v. Bill Law,* 92 S.Ct. 418 (Dec. 13, 1971).

Eugene N. Cookmeyer, like Frederick P. Adams, was a motorcyclist. He was crossing a pontoon bridge constructed for the most part of old barges, when he struck a metal apron on the bridge and was injured. The bridge was so constructed that it could open to allow vessels to pass through, and vessels did pass through on the average of four times per hour. The Claimant insists that the *Cookmeyer* case is not applicable to the situation at hand because in that case the injuries sustained by the claimant were not directly related to the movement of the bridge as it opened to allow vessels to pass through. Respondent maintains that such a contention only asserts a distinction without a significant difference. The point is that The Fifth Circuit Court of Appeals and The U. S. Supreme Court have held in *Cookmeyer, "Cleveland"* and *"Troy"* (all supra) that a pontoon bridge and/or a movable bridge is, ". . . in fact and in purpose a bridge, and is, as such, an extension of the land, beyond the admiralty jurisdiction of this Court." Petitioner contends that part

of the bridge over Cedar Bayou is a bridge and that the movable portion is an "aid to navigation." *Cookmeyer* and the other cases cited rightfully reasons that *all* portions of a drawbridge, even a floating drawbridge, constitute an extension of the land, and a claimant will not be heard to take the structure apart, a piece at a time, and say "This part is a bridge and that part is vessel and the draw portion is an aid to navigation." This is so because the primary purpose of the Cedar Bayou Bridge was, and is, to span the waters of Cedar Bayou. When the draw portion of the bridge is opened, yielding by necessity to allow water commerce to pass, the bridge is performing a function ancillary to the primary function of the structure. The status of the structure or appliance is determined by the primary purpose of the structure or appliance involved.

Harris County does not wish to be repetitious or presumptuous, but it respectfully maintains that this Honorable Supreme Court may dispose of this matter by declining to grant a writ of Certiorari based upon Judge Boyle's reasoning in *Cookmeyer,* as follows:

> "The accident forming the basis of this suit having taken place on a bridge, this Court [Federal District Court] lacks admiralty jurisdiction under the premise that a bridge or other structure firmly attached to the land is an extension of land and hence not a subject of the maritime jurisdiction of this Court.
>
> "Plaintiff herein is currently pursuing his proper remedy in a state court negligence action."

Only two days after the Fifth Circuit Court of Appeals rendered its opinion in this case now before the Supreme Court, This Honorable Court reversed that Court in

Victory Carriers (supra). *Victory Carriers*, as the case at hand, involved injuries sustained in a maritime setting, where "things about a ship" were not immediately involved. Please note that the "maritime connection" in *Victory Carriers* was overwhelming, whereas in the case now before the Supreme Court, the maritime connection is ephemeral at best. The Supreme Court ruled as follows in *Victory Carriers*:

> "No case in this Court has sustained the application of maritime law to the kind of accident that occurred in *that personal injuries on land are covered, for the most part, by state substantive law while such injuries on navigable water are generally governed by federal maritime law*. These two bodies of law do overlap and interpenetrate in some situations, and the amphibious nature of the longshoreman's occupation creates frequent taxonomic problems. In the present case, however, the typical elements of a maritime cause of action are particluarly attenuated: *respondent Law was not injured by equipment which was part of the ship's usual gear or which was stored on board, the equipment which injuried him was in no way attached to the ship, the fork lift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gang plank. Affirmance of the decision below would raise a host of new problems as to the standards for and limitation of the applicability of maritime law to accidents on land.* At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law . . .
>
> "Perhaps such laws provide inadequate benefits, but we are poorly positioned to conclude that they do or for that reason to give special remedies to longshoremen when other employees operating forklifts for other employers in perhaps equally hazardous

circumstances are left to the mercies of state law. *Claims like these are best presented in the legislative forum, not here.*

"This is particularly true since extending the constitutional boundaries of the maritime law would not require Congress to make an equivalent extension of the jurisdiction of the federal courts sitting in admiralty. Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Articles I and III of the Constitution to enact a suitable solution." (Emphasis added).

Please notice that the facts of *Victory Carriers* presented a much stronger case for the application of maritime law than the one at hand because the plaintiff in *Victory Carriers* was a longshoreman, whose traditional connection with maritime commerce was unquestioned.

Frederick P. Adams is not entitled to the favored treatment allowed the claimant in *Chevron Oil Co. v. Huson*, 92 S.Ct. 349, 386 (12/6/71). Mr. Adams must accept the fact that the law applicable to this cause is, and has always been the same. That is, there is not, and there never has been, a remedy in the Maritime Courts for his claim. Plaintiff's remedy, *if he has one*, and he now admits for his own purposes that he does not have one, is in the District Court of Harris County, Texas, where his *pending lawsuit* lies dormant. The *Huson* concept cannot aid one who has done nothing more than cite inapplicable cases to bolster a thoroughly discredited theory.

Equity is not evoked merely because a claimant has been wrongfully advised that there is a remedy for his problem. If there be cruelty in this case beyond that which

life holds for us all, it is not in the law which must inexorably apply to the allegations, but it is in ill counsel which has begotten hope where there is none, and has promised a right where one has never existed.

Respectfully submitted,

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Filed: May _____, 1972.

CERTIFICATE OF SERVICE

I, ANTHONY D. M. SHEPPARD, one of the attorneys of record for the respondent in this cause, hereby certify that I hand delivered a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the offices of BROWN, KRONZER, ABRAHAM, WATKINS & STEELY, 500 Houston First Savings Building, Houston, Texas, on May 16, 1972.

Anthony D. M. Sheppard
ANTHONY D. M. SHEPPARD
Assistant County Attorney

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1342

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S REPLY BRIEF

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HARRIS COUNTY, TEXAS, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S REPLY BRIEF

To The Honorable Supreme Court Of The United States:

Under what Respondent terms a "Statement of Policy," appearing on page 3, counsel intones that the County "will continue to abide" the observations of the intermediate court that "There is no place in this appeal for acrimony, or its bearing on personalities."

It would appear that it is impossible for Respondent's counsel to comply with that suggestion, or they are simply incapable of understanding the meaning of those words.

For example, on page 18 of the "Response," the following statement appears:

> "The Honorable Trial Judge chose to *align himself* completely with the Claimant's cause, almost to the point of *becoming an advocate of Claimant.*"

This unbridled attack upon the integrity of the District Court is not only acrimonious by definition, but it fairly approximates the equally blatant Motion for Leave to File a Petition for Writ of Mandamus, to which reference was made in Footnotes 1 on pages 2 and 3 of the Petition for Writ of Certiorari. We pray the Court to examine that document.

Another illustration of the inability of counsel to adhere to the County's "Statement of Policy" appears on pages 22 and 23 of the "Response," wherein it is stated:

> "Equity is not evoked merely because a Claimant has been wrongfully advised that there is a remedy for his problem. If there be cruelty in this case beyond that which life holds for us all, it is not in the law which must inexorably apply to the allegations, but it is in *ill counsel which has begotten hope where there is none,* and has promised a right where one has never existed."

These charitable insults are anent to a misrepresentation of counsel implicit in this Response.

Totally *dehors* the record the County emphasized on page 2 that:

> "Mr. Adams has also filed a suit in the District Court of Harris County, Texas which is pending."

Then, again outside the record, counsel inaccurately states on page 22:

> "* * * there is not, and there never has been, a remedy in the Maritime Courts for his claim. Plaintiff's remedy, *if he has one,* and he now admits for his own purposes that he does not have one, is in the District Court of Harris County, Texas, where his *pending lawsuit* lies dormant. * * *" (Emphasis by Respondent)

This excerpt patently suggests that Adams has a viable remedy extant, and that his counsel has merely admitted "for his own purposes" at this stage that Adams "does not have one." It would serve no useful purpose to belabor this matter. The County has a Motion to Dismiss in the state court action based upon the doctrine of sovereign immunity, and on behalf of Mr. Adams we tender that arm of government the opportunity to withdraw that Motion and proceed to trial on the merits. Obviously it will not do so, and these inappropriate observations outside the record are but further evidences of what this grievously injured young man has had to put up with.

Other than to note that the *Troy* and *Cleveland* cases do not touch, top, side or bottom, the question here before the Court, only one other matter in the "Response" merits attention. In undertaking to explain the addication of responsibility by the Court of Appeals to consider only those allegations and matters of evidence favorable to Adams in this interlocutory appeal, Respondent has the following to say:

> "* * * Furthermore, please remember that the *Trial Court is the trier of facts in maritime cases,* and his conclusions would bear far more weight

under these circumstances than a case that would eventually be tried before a jury. For these reasons, no procedural error was committed by the Honorable Fifth Circuit Court of Appeals." (See page 19 of the Response.)

This is a legal misrepresentation of the situation. In an interlocutory appeal under 28 USCA, Section 1292(b), neither the District Courts nor the Courts of Appeals become triers of fact in the ordinary sense, but it is this very fact-finding process that was indulged by the Court of Appeals that we attack. It occurs to us that had the Court of Appeals adopted the correct rule, it would never have made the factual conclusions leading to its ultimate Judgment. In any event, the Court of Appeals and counsel for Respondent are in gross error in resolving factual differences. The trial Court was not a trier of fact in the context of a matter of maritime jurisdiction. Moreover, as we have previously noted, the opinion of the District Court was rendered prior to the time the depositions establishing the true facts were taken.

In sum, counsel for Respondent sanctimoniously claims it has taken the "high road." If so, we would muchly dislike to examine the "low road."

WHEREFORE, Frederick P. Adams once again prays this Honorable Court to grant Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter reverse

and remand that decision for trial on the merits, and for such other orders as appear proper in the premises.

Respectfully submitted,

BROWN, KRONZER ABRAHAM,
WATKINS & STEELY

By: _____
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Reply have been mailed to Joe Resweber, Esq., Counsel for Harris County, Texas.

_____
W. JAMES KRONZER